CALPELRA
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November 26, 2011

Suzanne Murphy, General Counsel
Les Chisholm, Division Chief
Public Employment Relations Board
1031 18th Street
Sacramento, California 95814

Re: AB 646 Emergency Regulations

Dear Ms. Murphy and Mr. Chisholm:

The CALPELRA Board of Directors writes to comment on the November 14, 2011, revised PERB staff discussion draft of emergency regulations implementing Assembly Bill 646.

Regulations Should Increase Predictability And Provide Procedural Certainty

CALPELRA opposed Assembly Bill 646, and we believe it requires substantial revision and amendments. We understand the difficulty PERB faces given the ambiguities inherent in the final version of AB 646, and we do not expect PERB to conclusively resolve any such ambiguities. Nonetheless we believe that PERB can provide certainty and reduce risks for those agencies opting to participate in factfinding and avoid litigation, while at the same time preserve the litigation option for those agencies with the desire and funds to challenge the statute.

PERB's regulations should be designed to reduce uncertainty and provide procedural predictability to the greatest extent possible in the factfinding process. Public agencies and public employee unions across the state are currently bargaining in a time of fiscal crisis and uncertainty. During these fiscally unstable times, most public agencies seek to avoid the unnecessary risks inherent in unfair practice charges with potentially costly remedies including orders to return to the status quo ante. Because many agencies understand the risks of an unfair practice remedy – the turmoil created by reinstating public services, the cost of paying the resulting back pay, and the lack of the financial resources necessary to fund lengthy litigation – agencies need procedural certainty to reduce or avoid the risks.

The November 14, 2011, staff discussion draft does not increase procedural predictability, and will leave both public employers and employee organizations facing great uncertainty regarding what is required under the new law.

There are two primary issues that PERB should clarify with its emergency regulations:

- **Deadline For Demanding Factfinding When No Mediator Is Appointed:** The regulations should add a deadline by which the exclusive representative must request factfinding. Burke Williams & Sorensen suggested a timeline in their November 8, 2011, submission, but the establishment of a clear deadline is more important than the particular length of the deadline. Without any time limit within which the exclusive representative must request factfinding, public employers will be unable to be sure when the mandatory impasse procedures are complete. Without a clear deadline, public agencies at impasse without mediation will assume the risk of determining an adequate period of time within which the union must request factfinding. Public agencies will face the prospect of holding a public hearing regarding the impasse and adopting a Last, Best, and Final Offer as authorized by Government Code Section 3505.7, only to face a *subsequent* demand from the exclusive representative to engage in the lengthy factfinding process. We urge PERB to add the following to its November 14 proposed regulation:

  > 32802
  > "(a)(2) In cases where the parties were not required to participate in mediation and did not agree to do so voluntarily, a request for factfinding may be filed not sooner than 30 days *nor later than 40 days* from the date that either party has served the other with written notice of a declaration of impasse."

- **Clarify Effect Of Deadline On Impasse Hearing Requirement:** The regulations should also provide that if the exclusive representative does not request factfinding within the prescribed timelines, the public agency may proceed to the public hearing required by Section 3505.7 without violating the agency's good faith duty to participate in the impasse procedures, including factfinding. We urge PERB to adopt the following regulation:

  > 32802
  > "(e) If the exclusive representative does not request factfinding within the limits established in Section 32802 of these regulations, upon exhaustion of any applicable impasse procedures, the public agency may, after holding a public hearing regarding the impasse, implement its last, best, and final offer."

PERB can adopt these regulations that will provide the needed procedural certainty without resolving, or taking a position on the question of whether mediation is a necessary precondition to mandated factfinding. Although we are unsure of the precise language required, we believe that PERB could insert in its regulation a statement such as the following:

> "These regulations are intended solely for the purpose of providing procedural guidance to the MMBA covered agencies, in the absence of participation in mediation: (1) the time period within which the employee organization must request factfinding; and (2) when the factfinding timelines begin running. These regulations shall not be given deference by any party or reviewing court as PERB's construction of Government Code Sections 3505.4 - 3505.7 regarding whether participation in mediation is a precondition to requiring factfinding, or whether the receipt of a factfinding report is a precondition to allowing the employer to unilaterally adopt a last, best, and final offer."[1]

Revised MMBA Should Not Delegate Authority To Mediator To Certify Parties To Factfinding

The November 14, 2011, staff discussion draft adds a requirement that an exclusive representative requesting factfinding must submit evidence that the mediator has informed the parties that further mediation proceedings would be futile. This requirement delegates undue authority to the mediator, and has no statutory basis. Unlike Section 3548.1 of the EERA that specifically requires a declaration from the mediator that factfinding is appropriate to resolve the impasse before the matter will be submitted to factfinding, neither AB 646 nor any preexisting provision of the MMBA grants the mediator such authority. As a matter of labor relations policy, many MMBA agencies might chose not to mediate because such a decision would delegate the impasse timeline to a mediator, without providing any administrative appeal or recourse. In addition, adding to the regulations a requirement that an exclusive representative requesting factfinding must submit evidence that the mediator has informed the parties that further mediation proceedings would be futile would grant the mediator more authority than intended by most of the local agencies with regulations involving mediation or by the legislature.

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[1] PERB's factual findings are "conclusive" on reviewing courts as long as those findings are supported by substantial evidence on the record considered as a whole. Government Code Section 3509.5(b). The courts have the ultimate duty to construe the statutes administered by PERB. When an appellate court reviews statutory construction or other questions of law within PERB's expertise, the court ordinarily defers to PERB's construction unless it is "clearly erroneous." See *Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575.

Thank you for your assistance in addressing these important matters.

Sincerely,

M. Carol Stevens
Executive Director

MCS/smc

Altarine Vernon, CALPELRA Board President
Delores Turner, CALPELRA Board Vice President
Ivette Peña, CALPELRA Board Secretary
G. Scott Miller, CALPELRA Board Treasurer
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